BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court (R. 116) is not reported.

The opinion of the Circuit Court of Appeals (R. 2014) is reported in 134 F. (2d) 142.

Jurisdiction

Jurisdiction of this Court is invoked under section 248 of the Judicial Code as amended by the Act February 13, 1925 (U. S. C. Title 28, section 347(a)).

Statement of the Case

The facts in so far as material to this application are set forth in the petition.

Specification of Errors

It is submitted that the Circuit Court of Appeals erred:

(1) in affirming so much of the judgment of the District Court as adjudicated that the plaintiff had the right to condemn the property of the defendants;

(2) in failing to dismiss the action upon the ground that the District Court had no jurisdiction, or upon the ground that the District Court should not have assumed jurisdiction under the doctrine of *forum non conveniens;*

(3) in failing to hold that the Burlington was estopped by past dealings and previous recognition from asserting that the Bridge Company has no legal authority to own or operate the property sought to be condemned, and in failing to consider the evidence in support of such contention;

(4) in holding that the plaintiff had the right to condemn the property of the defendants under the provisions of section 1512 R. S. Mo. 1939, because such property was not devoted to a railroad use by a corporation which had the power and right under the Missouri statutes and under its articles of association to engage in such operations;

(5) in failing to hold that the Bridge Company was a union depot company and that the forfeiture provisions of section 5248 R. S. Mo. 1939 were inapplicable to such a corporation.

The specifications other than (4) and (5) have been sufficiently discussed in the foregoing petition.

POINT I

IN MISSOURI AND ELSEWHERE THE RULE IS ESTABLISHED THAT THE STATE MAY DELEGATE THE RIGHT TO CONDEMN FOR A SUPERIOR USE PROPERTY ALREADY DEDICATED TO A PUBLIC USE, BUT MAY NOT DELEGATE THE RIGHT TO CONDEMN FOR THE SAME USE PROPERTY ALREADY DEDICATED TO A PUBLIC USE. SECTION 1512 WAS NOT INTENDED TO CHANGE THE FOREGOING RULES BUT AS WAS HELD BY THE SUPREME COURT OF MISSOURI IT WAS INTENDED SIMPLY AS A LEGISLATIVE DECLARATION THAT A RAILROAD USE WAS NOT SUPERIOR TO AN EXISTING LAWFUL PUBLIC USE. NO MISSOURI CASE HOLDS THAT THERE MAY BE CONDEMNATION FOR THE SAME USE SOLELY BECAUSE THE OWNER'S CHARTER HAS BEEN FORFEITED OR THE OWNERSHIP IS ULTRA VIRES ALTHOUGH THE STATE HAS ACQUIESCED IN THE CONTINUED PUBLIC USE.

The following principles are now well established in Missouri and elsewhere: (1) Property held for a public use may nevertheless be taken for a superior public use if the express power so to take has been delegated. (2) Property held for a public use may nevertheless be taken

for a different but not a superior use if the express power so to take has been delegated *and* if the taking will not materially interfere with the existing use. (3) Property held for a public use may not be taken for the same public use under a delegated power to take because under such circumstances the taking is really a matter of private concern and not for a public purpose.

> Lewis on Eminent Domain (3rd Edition), section 440, page 791.

In *Kansas & Texas Coal Ry. Co.* v. *Northwestern Coal & Mining Co.*, 161 Mo. 288, at 321, the court said:

> "It has been decided in this and other jurisdictions, and is the accepted law, that the fact that land sought to be condemned for a public use is held, owned and used by a corporation organized for private gain is no defense to the right of condemnation. [Twelfth Street Market Co. *v.* P. & R. T. R. Co., 142 Pa. St. 580; Lewis on Em. Dom., sec. 274, and cases cited].
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> "The same principle is declared even where the property sought to be condemned is held and used by a corporation possessing the power of eminent domain and is using the same for a public purpose. [St. L. H. & H. K. Ry. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82; Kansas City *v.* Oil Co., 140 Mo. 458; Kansas City Belt R. R. Co. *v.* K. C. St. L. & Chicago R. R. Co., 118 Mo. 599; Lewis on Em. Dom., sec. 274, and cases cited.] *The only qualification to this rule is that such property cannot be taken from one corporation by another corporation, to be used for the same purpose in the same manner that it was used by the corporation that first appropriated it to such use and purpose.* [Lewis on Em. Dom., sec. 276.] In other words, every corporation holds property subject to the right of the State to take it for another public use, whenever in the discretion of the Legislature the exigencies require its use for such other purpose, and this is true even as to the franchise itself of any corporation." (Italics ours)

And in that case the court also said at page 322:

> "It goes without saying that one railroad company could not condemn the right of way of another railroad company and use it for the same purpose as the first company was using it."

In Lewis on Eminent Domain (3rd), supra, it is said at section 440:

> "But the legislature cannot take the property of A, such as a toll-bridge, and transfer it to B to be still used as a toll-bridge by B in the same manner as it had previously been by A. This would simply be taking the property of A and giving it to B, which the legislature is powerless to do. 'Where there is no change in the use there cannot be a change in ownership under the law of eminent domain'."

The following cases support this statement:

West River Bridge Co. v. *Dix,* 6 How. (U. S.) 507, 537;

St. Louis H. & K. C. Ry. Co., v. *Hannibal Union Depot Co.,* 125 Mo. 82;

City of Hannibal v. *Hannibal etc. R. R. Co.,* 49 Mo. 480;

Southern Co. v. *Stone,* 174 Mo. 1.

In *K. C. Suburban Belt Ry. Co.* v. *K. C. St. L. & C. Ry. Co.,* 118 Mo. 599, 615, the court quoted with approval from *Appeal of Pittsburgh Junction R. R. Co.,* 122 Pa. St. 511, where the court said:

> "The principle is well settled that the lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as a right of way by another railroad company, except for mere crossings, and then only for crossing purposes, and not for exclusive occupancy."

Another principle well established in Missouri is that only the state can question executed ultra vires acts. Unless the attack is authorized by express legislative permis-

sion. In *Conn. Mututal Life Insurance Co.* v. *Smith,* 117 Mo. 261, the court said:

> "The settled law of this State, as illustrated by frequent instances in this court, is that the capacity of a corporation to take a conveyance of land cannot, after the transfer has reached completion, be called in question in a collateral way, but by the State and not by a private suitor. This doctrine applies to all classes of actions and in every variety of cases. [Citing cases]
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> "The only exception to the rule which prohibits collateral attack by private persons on such conveyances or other unauthorized acts of a corporation, is where such attack is authorized by express legislative permission." [Citing cases]

Still another principle established in Missouri since the enactment of the Public Service Law in 1913 (Mo. Laws 1913, p. 1588; Mo. R. S. 1939, p. 35) is that the right to regulate the use of property depends on whether it is in fact being devoted to a public use and does not depend on the charter powers of the user.*

> *State ex rel. Danciger* v. *Public Service Commission,* 275 Mo. 483.

And properties devoted to public use cannot be voluntarily withdrawn therefrom even if the charter of the corporate owner does not authorize such use.

> *State ex rel. P. S. C.* v. *Missouri Southern R. R. Co.,* 279 Mo. 455.

There are a few old decisions in states other than Missouri holding that property voluntarily devoted to a public use *which use might be discontinued at any time* could be condemned the same as if devoted to a private use even though the public would thereby be deprived of an existing service. (Lewis on Eminent Domain, 3rd, §445.) But these cases obviously cannot be controlling now in view of the fact that

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* The Commission has held the Bridge Co. to be under the jurisdiction of the Commission (p. 14 footnote).

under Public Service Laws property devoted to the public service cannot be withdrawn therefrom at will. The cases seem to be unsound if by the condemnation the public is deprived of an existing public service.

Having in mind these principles, the question here is what was the legislative intent underlying section 1512?* Does it purport to delegate the power to take property for a public use which is already dedicated to the same use** for which it is sought to be taken simply because the existing owner is a corporation which acquired and operated the property beyond its charter powers although that owner cannot voluntarily abandon such use and the State has acquiesced in the continued public use.

In *K. & T. Coal Ry. Co.* v. *Northwestern Coal & Mining Co.*, 161 Mo. 288, *supra*, the court thus stated the purpose of section 1512, at page 322:

> "In the light of this constitutional provision and of these adjudications in this and even in other States that have no such constitutional reservation, it cannot be said that the Legislature intended by section 2741 [now 1512] to say, or had the constitutional right to say, that property held by any corporation, public or private, possessing or not possessing the power of eminent domain, should not be subject to condemnation for another or superior public use. *That section is a simple legislative declaration that the use of the land for railroad purposes is not a superior use to the use of the land by the company that owns it and has already devoted it to one use authorized by law. It goes without saying that one railroad company could not condemn the right of way of another railroad company, and use it for the same purpose as the first company was using it.*" (Italics ours.)

The statute as thus construed, therefore, obviously is not intended to delegate a power to condemn for the *same purpose*** as that to which the property is already devoted, but,

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* Quoted at page 3 *supra*.

** That the present use and proposed use are the same is uncontradicted (R. 730, 765-6, 282).

as the Missouri court held, is a mere recognition of the principle that property may be condemned for *superior* use and that a railroad use is not a superior use. Whether or not the legislature of Missouri could enact a statute that property being operated ultra vires or by a corporation whose charter is forfeited could be condemned by another railroad company for the same use, need not be determined at this time. The important point is that there is no indication of intent to delegate any such power to railroad companies.

While the immediate reason for the enactment of section 1512 is not discussed by the Missouri Supreme Court, it is believed its origin was this: In 1866 when the statute was originally enacted (Mo. Laws 1865-1866, c. 73, §8), it applied only to railroad and telegraph companies. Such companies were then obtaining Federal grants to extend their lines beyond the Missouri River. There was possibly a question as to how far these Federal grants might be claimed to make a public use for railroads and telegraphs a superior use and therefore permit condemnation of property already devoted to a different public use. To clarify the situation, the 1866 Act was evidently passed to make it certain that a use for railroad and telegraph companies was not a superior use and that the general principle (set forth above) was applicable,—that land already dedicated to a public use could not be taken for another use which would materially interfere with the existing use. In view of the statement of the Missouri Supreme Court as to the purpose of the Act, and in view of its probable history, and in view of the rules prohibiting delegation of the power to condemn for the same use, it seems clear that there was no legislative intent to have the statute apply to a case where the proposed use was the same as the public use to which the property was already dedicated. There is also no indication that it was the legislative intent by this statute to permit the taking of property for the same use simply because the user with the acquiescence of the State was operating ultra vires or despite the forfeiture of its charter, or that this statute was intended as a substitute for *quo warranto*.

A brief analysis should be made of the authorities which the court below cites to sustain its conclusion.

Kansas & T. Coal Ry. Co. v. *Northwestern Coal & Mining Co.*, 161 Mo. 288, does not sustain the court's conclusions for in that case while there was a wide discussion of various principles of condemnation, it there appeared that the property sought to be condemned was not being devoted to any public use at all. The condemnee was a private mining corporation which devoted its property to a private use. The court referred to the charter powers of the condemnee merely to show that the charter contemplated only a private use. There was not presented or decided the question whether property which, with the acquiescence of the State, has been dedicated to the public use for many years *by a corporation whose charter does contemplate a public use,* can be condemned for the same use simply because the operation is ultra vires. Indeed the court itself intimated that its answer to this question would be negative for its opinion clearly indicates that a corporate charter which does contemplate a public use cannot be attacked or questioned collaterally or in any manner except by *quo warranto* if the charter is regular on its face (161 Mo. at pp. 307, 308, 309).

Nor do the other authorities relied on by the court below in support of its conclusion in fact give such support. The court cites the Missouri Constitution, Article 12, section 7, which provides that no corporation shall engage in business other than that expressly authorized in its charter. The court overlooks the fact, however, that the Supreme Court has specifically held that these provisions but incorporate the applicable common law and that the ultra vires act cannot be questioned by anybody but the state in a *quo warranto* proceeding unless there is an express legislative permission to question it. *State ex rel American Surety* v. *Haid,* 325 Mo. 949; *Hill* v. *Rich Hill Coal Mining Co.,* 119 Mo. 9; *Schlitz* v. *Poultry Game Co.,* 287 Mo. 400, 408; *Illinois Fuel Co.* v. *M. & O. R. R. Co.,* 319 Mo. 899, 926.

In *Orpheum Theatre & Realty Co.* v. *Brokerage Co.*, 197 Mo. App. 661, also cited by the court, there was laid down the well established rule that where there is involved an executory contract ultra vires is a good defense.

In *Schlitz Brewing Co.* v. *Poultry & Game Co.*, 287 Mo. 400, ch 412, the Supreme Court said of the *Orpheum Theatre* case:

> "In so far as the remainder of the opinion in the case cited is concerned it is, if not *obiter*, out of accord with the settled rule in this State."

In *Hoagland* v. *Hannibal and St. Joseph R. R. Co.*, 39 Mo. 451, also cited by the court, an action was brought to recover for failure to deliver freight and it was insisted that the defendant was bound by express contract to carry and deliver. The court found that the railroad had no power to carry the freight over the particular line and held in accordance with well established authority that the executory contract was unenforcible.

It is difficult to see how these cases have any bearing upon the question here presented or justify the court's conclusion. The court below attempts to justify that conclusion by saying that the condemnation statute contemplates that the public interest can best be served in any event by allowing the property to be acquired for the same use by any corporation which has the specific power and obligation under its charter to make a legal and permanent dedication of it. There is nothing in the statute which justifies the holding that this was its purpose or that its purpose was other than that stated by the Missouri Court. Of course, the fallacy of the argument lies in the fact that if the construction is correct, the property may be taken not only for the same use but also may be taken for a different use *although not superior* and although it materially interferes with or terminates the existing use. If the court's construction is sound, any company having the power of eminent domain has had delegated to it the right to condemn this

railroad and to deprive the hundred and more industries in North Kansas City of railroad service. Any such company can condemn the property in such a way as to prevent further service and the courts would be powerless to grant relief simply because the actual construction of the road and its long operation never questioned by the State was beyond the express charter powers of the company, and despite the fact that the operation cannot be discontinued without State permission. It is submitted that this construction is absurd and one which cannot be other than detrimental to the public interest.

It is submitted, therefore, that the foregoing analysis of fundamental principles and the underlying purpose of section 1512 make it clear that the interpretation below of section 1512 conflicts with Missouri law and cannot be sustained. If and when the question reaches the Supreme Court of Missouri, it is submitted that a wholly contrary conclusion must be reached.

POINT II

THE COURT BELOW ERRED IN HOLDING THAT EVEN IF THE BRIDGE COMPANY WAS A UNION DEPOT COMPANY, OR BOTH A RAILROAD COMPANY AND A UNION DEPOT COMPANY, THE PROVISIONS OF SECTION 5248 OF THE REVISED STATUTES OF MISSOURI WERE APPLICABLE AND ITS CHARTER POWERS HAD BEEN FORFEITED. THE HOLDING IS IN CONFLICT WITH MISSOURI DECISIONS.

The court below did not determine whether the Bridge Company was in fact incorporated as a union depot company or both a railroad company and a union depot company, but held that even if it were, the provisions of section 5248* were applicable and its charter forfeited. Recognizing that union depot companies originally were provided

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* Quoted at p. 3, *supra*.

for by a separate Act, and "probably" recognizing the principle that the placing of this special Act in the revised statutes did not make the forfeiture provisions applicable to a union depot company, the court nevertheless found these provisions applicable because of two statutes passed, respectively, in 1879 and 1899 which the court held not to be revisions but specific legislative enactments which did make forfeiture provisions applicable to the union depot companies. This conclusion, it is submitted, was erroneous, contrary to Missouri decisions and based upon an erroneous interpretation of the statutes referred to.

Preliminarily it should be pointed out that the rule in Missouri is well established that " * * * the carrying of a Session Act into the revised statutes does not change its effect nor does its mere arrangement or location by the revisers make it part of the statute with which it is grouped so as to qualify its meaning." *Aloe* v. *Fidelity Mutual Life Association,* 164 Mo. 675, 696. So, too, it is well settled in Missouri that the act of a legislature in making the periodic revisions of the statutes required by the Constitution is deemed not to be a re-enactment of the various laws included in the revised statutes, but only a continuation of the prior laws conveniently arranged or codified. (*City of St. Louis* v. *Alexander,* 23 Mo. 483, 509; *City of Cape Girardeau* v. *Riley,* 52 Mo. 424, 428; *Paddock* v. *Missouri Pacific Railway Co.,* 155 Mo. 524, 536; *State* v. *Gantt,* 274 Mo. 480.)

In the *Paddock* case the court said with respect to the incorporation of the statute into the revised statutes " * * * the effect was no different from what it would have been if no such collation or revision had been made."

It is also the law of Missouri that where a statute repeals old sections and enacts new ones in place thereof, such statute is regarded simply as an amendment of the earlier sections and as a continuation thereof. *State* v. *Bradford,* 314 Mo. 684, 697; *Brown* v. *Marshall,* 241 Mo. 707, 728; *Belfast Investment Co.* v. *Curry,* 264 Mo. 483, 497; *State* v. *Ward,* 328 Mo. 658, 668-9; *State ex rel. Truman* v. *Jost,* 269 Mo. 248, 258.

On the other hand, it is the law of Missouri that where provisions of independent statutes are brought into the same article and chapter by a separate act of the legislature, and not merely by statutory revision, the provision thus brought in becomes applicable to the whole chapter. *Turner* v. *Missouri, Kansas, Texas R. Co.*, 346 Mo. 28; *Corley* v. *Montgomery*, 226 Mo. App. 795, 803.

The error of the court below consists, in applying the last principle above stated, to the facts with respect to the two acts referred to rather than the first principles enunciated with respect to the effect of the revisions and amendments.

As to the Act of 1871

In March 1871 statutory provision was made for the first time for the organization of union depot companies. This was done not as an amendment to the chapter of the General Statutes embodying the General Railroad Law, but as an original Act, the "Union Depot Act" (Missouri Laws 1871, page 53). This Act, unlike the General Railroad Law, made no provision for the forfeiture of the union depot corporation's charter. The then existing forfeiture provision of the general railroad chapter of the General Statutes did not apply to a union depot corporation because that provision referred to, and was thereby limited, specifically to "any corporation formed under this Act." Subsequently in 1872, because of one of the periodic revisions of the Missouri statutes, the provisions of the Union Depot Act were incorporated into the chapter and article dealing with the organization of railroad corporations which contained the forfeiture provisions. Under the rule above stated, this incorporation did not make the forfeiture provisions applicable to a union depot company and this, the court below said, "probably is correct."

As to the Act of 1879

In 1879 the legislature passed an Act, approved May 31, 1879, entitled:

> "Chapter 21, Railroad Companies—Article 2.
> An act to revise and amend Chapters 63, 64, 65 and 66 of the General Statutes of the State of Missouri, concerning corporations,
> Be it enacted by the General Assembly of the State of Missouri, as follows:
>
> Railroad Companies.
> Incorporation."

This Act of 1879 re-enacted Section 1 of the original Depot Act of 1871, without change, and enacted Section 4 or of the original Union Depot Act, with the last proviso eliminated. As stated, the Act of 1879 also reenacted the forfeiture section, as Section 823 of the same "chapter 21 Railroad Companies—Art. 2." It is claimed that by this enactment the forfeiture provisions became applicable to union depot companies.

However, the history of that Act* shows that this is not the case:

In 1879, pursuant to the requirements of the Missouri Constitution of 1875, it became necessary for the General

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* This legislative history appears from the "Joint and Concurrent Resolutions in Relation to the Revision of the Statutes of the State of Missouri," printed in the published Laws of Missouri, 1879, p. 257, under the heading "Resolutions," a copy whereof is presented as Appendix "B" to this brief; from the preface of the revisers to the Revised Statutes of 1879, a copy whereof is presented herein as Appendix "C"; and from Sections 7 and 8 of an act entitled "Statutes: Revision and Publication of. An Act Declaratory of the Revised Statutes of the State of Missouri and Their Effect and to Provide for the Collation, Editing, Printing, Binding, Publishing and Distributing the Same," Laws of Missouri, 1879, p. 210. A copy of Section 7 is printed herein in Appendix "D". The provisions of Section 8 are printed in the body of this brief, *infra*.

Assembly to revise the Missouri statutes. In order to comply therewith the General Assembly in 1879 adopted the procedure set forth in the Joint Resolution appearing in Appendix "B". It appointed a committee and provided that its duty should be to revise all the statute laws of the state and that " * * * *as said committee shall complete the revision of each separate act or subject, contained in the present statutes* or session acts, or shall submit an act upon any new subject, the same shall be reported to either house for adoption or approval, or to be otherwise disposed of by the General Assembly." (Paragraph First of Appendix "B") It further provided that " * * * at the conclusion of the revision of all the laws and the adoption thereof, a bill or bills may be offered and acted upon, *declaratory of such revision,* and providing for carrying the same into effect, and for the preparation of convenient indices, marginal notes, references to court devisions and publishing and distributing the same" (Paragraph Fifth of Appendix "B").

The General Assembly also passed an act (Laws of Missouri, 1879, p. 210) entitled "Statutes: Revision and Publication of. An Act Declaratory of the Revised Statutes of the State of Missouri and Their Effect, and to Provide for the Collation, Editing, Printing, Binding, Publishing and Distributing the Same." This provided for the publication of the Revised Statutes in two volumes and that

> "Sec. 8. All acts of a general nature, revised and amended and re-enacted at the present session of the general assembly, *so soon as such acts shall take effect* shall be taken and construed as repealing all prior laws relating to the same subject, but the provisions of the Revised Statutes, so far as they are the same as those of prior laws, *shall be construed as a continuation of such laws and not as new enactments."* (Italics ours.)

All of the more important subjects in the statutes were thereupon revised, reported and passed in the same fashion

as other bills. (See Reviser's preface in Appendix "C.") Ultimately, the work of revision having been completed so far as was practicable to be done by legislation, the General Assembly by an act approved May 31, 1879 (the same day as the act relied upon below), continued a portion of the original committee in session, after the General Assembly's adjournment, to collate, annotate and prepare the work for publication. (See Appendix "C.") The committee then completed the revision as required, *i. e.*, having annotated the same and published the same as the Revised Statutes of 1879. What was thus published was the declaratory revision provided for in the Joint Resolution. In their preface to this declaratory revision the revisers who annotated the same state:

> "To each section has also been added a reference showing the date of the last enactment, the page and section if taken from the session acts, or the page and section if taken from the revision of 1865; or if a new or amended section, it is so indicated, and wherever the words 'amended' and 'new section' occur in the references, they are to be understood as applying exclusively to revised bills." (See Appendix "C.")

When the declaratory or permanent Revised Statutes of 1879 were printed, Section 823, the forfeiture section upon which the Burlington relies, bore the revisers' notation as follows:

> "(Laws 1869, p. 73-m)."

Section 826 providing for the incorporation of union depot companies bore the revisers' notation:

> "(Laws 1871, p. 59, Section 1)."

Section 827 setting forth the powers of union depot companies bore the reviser's notation:

> "(Laws 1871, p. 60, Section 4 amended)."

One further piece of legislative history which should be noted is that Section 7 of the act entitled "An Act Declaratory of the Revised Statutes," etc., provided that all acts temporary in nature need not be published in the Revised Statutes.* That probably explains why the Act of 1879, upon which the Burlington relies, was never published.

The conclusion of the court below as to the 1879 act conflicts with the decision of the Supreme Court of Missouri in the case of *Paddock* v. *Mo. Pac. Ry. Co.*, 155 Mo. 524. That case involved a statute adopted by the Thirty-fifth General Assemly of Missouri revising a portion of the general statutes and session laws then in existence. That statute made two different earlier acts part of one chapter, which then was incorporated in the permanent Revised Statutes of 1889 as Chapter 42. It was claimed that (155 Mo. at 535) said chapter "was enacted as a new act by the Thirty-fifth General Assembly, and hence the two acts referred to, though entirely different before, became a completely new act, and all of its parts must be construed together, * * *." This is exactly the same contention as the Burlington made below. However, that contention was rejected by the Missouri Supreme Court, which said (155 Mo., at p. 535):

> "The intention of the legislature when the Revised Statutes were adopted, is clearly expressed in Section 6606, Revised Statutes 1889, where it is provided: 'All acts of a general nature, revised and amended and re-enacted at the present session of the General Assembly, as soon as such acts take effect, shall be taken and construed as repealing all prior laws relating to the same subject; but the provisions of the Revised Statutes, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws, and not as new enactments.'**

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* Printed in Appendix "D."

** The provision relied on by the court is identical with Section 8 of "An Act Declaratory of, etc." quoted at p. 42, *supra.*

"Sections 2590 and 2591, as also Sections 2593 to 2597, inclusive, of the Revised Statutes 1889, as above shown, are exactly the same as the laws of March 31st and March 23d, respectively, and therefore those sections must be treated, under this legislative direction, as mere continuations of those laws and not as new enactments. They were entirely different laws before and they continued to be different notwithstanding they were carried into the Revised Statutes and placed in the same article of the same chapter of the Revised Statutes, and *notwithstanding that they may appear in the bill enacted by the Thirty-fifth General Assembly which revised chapter 42.* This has been the uniform ruling of this court on this question. (*St. Louis* v. *Alexander,* 23 Mo. 483; *City of Cape Girardeau* v. *Riley,* 52 Mo. loc. cit. 428; *State ex rel. Att'y-Genl.* v. *Heidorn,* 74 Mo. 410; *Pool* v. *Brown,* 98 Mo. loc. cit. 680.)" (Italics ours.)

To the same effect, also involving acts similar to the Act of 1879, see:

Timson v. *Coal & Coke Co.,* 220 Mo. 580, at pages 591-2, 119 S. W. 565, at p. 567 (*en banc*);

Dart v. *Bagley,* 110 Mo. 42, at p. 52, 19 S. W. 311, at p. 313;

State ex rel. Att'y-Genl. v. *Heidorn,* 74 Mo. 410, at pp. 411-412.

It appears from the foregoing history of the Act of 1879 and the State Court decisions that it was in legal effect no more than a revision of the existing law and a mere continuation thereof, and that accordingly it did not make the forfeiture provisions theretofore contained in the Railroad Act applicable to union depot companies.

As to the Act of 1899

This Act, Laws of 1899, page 124, was entitled

"An Act to repeal §§ 2667 and 2668, Revised Statutes of Missouri, 1889, and amendments thereto,

> concerning union depots and union depot corporations, and to enact new sections, to be known as §§ 2667 and 2668."

As amended, the sections contained the provisions now contained in 5251 and 5252 of the Revised Statutes of Missouri, 1939, which appear in Appendix A hereto. The contention is that this repeal of the two sections of 1889, Revised Statutes, and the enactment of new sections in lieu thereof made the forfeiture provisions applicable to union depot companies. The fallacy of this contention lies in the assumption that the sections enacted in lieu of the repeal sections are regarded as new enactments under Missouri law. The cases cited above show beyond question that a statute which repeals old sections and enacts now ones in place thereof is regarded simply as an amendment of the earlier sections and as a continuation thereof as amended. Thus, in *State* v. *Bradford,* 314 Mo. 684, the court said:

> "While the act of 1921, page 206, purports to repeal section 3973 of Revised Statutes 1919, yet, as the same law was reenacted with a modification, it is simply an amendment of the law of 1919, and is a continuation of the latter as amended. Brown *v.* Marshall, 241 Mo. loc. cit. 728, 145 S. W. 810, and cases cited; State ex rel. *v.* Jost, 269 Mo. loc. cit. 258, 191 S. W. 38, and cases cited."

And in *Brown* v. *Marshall,* 241 Mo. 707, at 728, the Court said:

> "A subsequent act of the Legislature, repealing and re-enacting, at the same time, a prexisting statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. State ex rel. *v.* Mason, 153 Mo. 23, loc. cit. 58, 59 (54 S. W. 524); State ex rel. *v.* County Court, 53 Mo. 128 loc. cit. 129, 130; Smith *v.* People, 47 N. Y. 330."

In view of the foregoing it is submitted that the decision below is in conflict with the Missouri cases in holding that the

forfeiture provisions become applicable to a union depot company by virtue of the enactments of 1879 and 1899.

In order to sustain its conclusion and to overcome the argument that the use of the word "road" in the forfeiture statute* obviously referred to a railroad having termini, the court was obliged to hold that by the mere passing of the Acts of 1879 and 1899 and, as the court held, the mere incorporation of the forfeiture section into the railroad provisions, the word "road" thereby became expanded so as, to be intended as a "generic reference to all of the special undertakings in the charter of either a railroad company or a union depot company, or a hybrid combination of both." In order to fortify this conclusion, the court found it necessary to say "that there would seem to be as much legislative reason for summarily laying at rest the powers of a union depot company possessed of the same privilege of eminent domain as in the case of a railroad company with respect to any of the special undertakings of its charter which it did not fulfill in the time and manner prescribed by the forfeiture statute." Nowhere in the legislative history is there any indication of such a reason for making the forfeiture statute applicable to union depot companies, and the union depot sections specifically provide that the incorporators are authorized "to form themselves into a corporation *under the general laws of this state relating to private corporations,*" thereby indicating that the corporation was being formed under the general laws rather than under the railroad law. Irrespective of this, the obvious fallacy of the court's reasoning lies in the fact that the "road" of a railroad company is recognized to mean the specific route over which its tracks were to run from terminus to terminus, and there is good reason to cause a forfeiture of the right to construct such a road within the statutory period so as to permit the same territory to be used by another railroad. In the case of a union depot

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* Quoted at p. 3, *supra.*

company, the statute does not require that any route or road need be set forth and here the charter of the Bridge Company provides that it may build a union depot either in Kansas City or in any part of the state (see page 9, *supra*). The reason which underlies the necessity for the forfeiture of the charter for failure to construct the "road" can have no application to a corporation which has not specified the specific place where its union depot is to be constructed.

If there is "as much legislative reason" for applying the drastic penalty of forfeiture to a union depot company as there is to a railroad company, is it not strange that the reason did not impress itself upon the legislators in 1871 when the Union Depot Act was first adopted and that the need for a forfeiture provision was not felt until 1879 or 1899? Is it not curious, also, that the legislature thought it necessary to provide for the forfeiture of a corporation organized to operate a railroad depot, whereas to this day it has seen no such necessity in the case of a corporation organized to operate a railroad bridge,—and this notwithstanding that such a bridge corporation has eminent domain privileges and the power to operate not only its bridge but extensive tracks and depots and terminal facilities on land? (Sections 5380-5382, R. S. Mo. 1939). *So. Ill. & Mo. Bridge Co.* v. *Stone,* 194 Mo. 175, aff'd. 206 U. S. 267.

POINT III

FOR THE REASONS SET FORTH IN THIS BRIEF AND THE FOREGOING PETITION THE APPLICATION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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